

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

DEANNA L. GEIGER and JANINE M.)
NELSON; ROBERT DUEHMIG and WILLIAM)
GRIESAR,)
)
)
Plaintiffs,)
)
)
v.) No. 6:13-cv-01834-MC

JOHN KITZHABER, in his official)
capacity as Governor of Oregon;)
ELLEN ROSENBLUM, in her official)
capacity as Attorney General of)
Oregon; JENNIFER WOODWARD, in her)
official capacity as State)
Registrar, Center for Health)
Statistics, Oregon Health)
Authority; and RANDY WALDRUFF, in)
his official capacity as Multnomah)
County Assessor,)

Defendants.

PAUL RUMMELL and BENJAMIN WEST;
LISA CHICKADONZ and CHRISTINE
TANNER; BASIC RIGHTS EDUCATION
FUND.

Plaintiffs

v) No. 613-cv-02256-TC

JOHN KITZHABER, in his official capacity as Governor of Oregon; ELLEN ROSENBLUM, in her official capacity as Attorney General of Oregon; JENNIFER WOODWARD, in her official capacity as State Registrar, Center for Health Statistics, Oregon Health Authority; and RANDY WALDRUFF, in his official capacity as Multnomah County Assessor.

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1 REPORTER'S TRANSCRIPT OF PROCEEDINGS

2 EUGENE, OREGON

3 WEDNESDAY, MAY 14, 2014

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1 PROCEEDINGS

2 WEDNESDAY, MAY 14, 2014

3 THE COURT: Please remain seated.

4 Thank you everyone. Good morning.

5 Ms. Pew, if you'd like to call our case.

6 THE CLERK: United States District Court for the
7 District of Oregon is now in session, the Honorable Michael
8 J. McShane presiding.9 Now is the time set for Case 13-01834, *Geiger, et*
10 *al. versus Kitzhaber, et al.*, oral argument.

11 THE COURT: All right. Thank you.

12 So I thought we could begin by having maybe each
13 of the attorneys for each group who is going to represent
14 their interests today introduce themselves.15 I guess we can introduce everyone. It takes more
16 time sometimes than the hearing itself.17 So let's go ahead with the plaintiffs, if you'd
18 like to make your introductions.19 MR. JOHNSON: Your Honor, Tom Johnson for the
20 *Rummell* plaintiffs, and I will also be speaking today on
21 behalf of the *Geiger* plaintiffs.

22 THE COURT: All right. Thank you.

23 MR. JOHNSON: We have -- I won't introduce all of
24 my -- our clients again. We did that last time.

25 The only person who is not here today is

1 Mr. Rummell, who is on a business trip.

2 THE COURT: Okay. Thank you, Mr. Johnson.

3 All right. For the defense.

4 MS. POTTER: Sheila Potter for the Department of
5 Oregon -- Justice -- excuse me; I am sorry -- the Oregon
6 Department of Justice.

7 I will be arguing on behalf of the state and the
8 county defendants.

9 THE COURT: All right. Thank you.

10 All right. For the proposed intervenors.

11 MR. JOHNSON: Judge McShane, John Eastman, and
12 with me Roger Harris on behalf of the intervenors National
13 Organization for Marriage.

14 THE COURT: All right. Thank you, Mr. Eastman.

15 So I have read the briefs, and what I don't want
16 to do is recite the briefs into the record.

17 I would like to keep the discussion focused on the
18 law and try to keep some of the hyperbolic statements in the
19 briefs to a minimum. I know each side has very different,
20 strong views of the motion to intervene, but there are some
21 legal issues we need to resolve.

22 So I am going to pose some questions. I am
23 probably going to pose more questions to Mr. Eastman because
24 the burden is on the National Organization for Marriage to
25 intervene. But I will ask, then, the other parties if they

1 have particular comments on anything that Mr. Eastman says.

2 So Mr. Eastman, I will start with Chief Justice
3 Roberts' fairly blunt holding in *Hollingsworth*.

4 He states, "We have never before upheld the
5 standing of a private party to defend the
6 constitutionality of a state statute where state
7 officials have chosen not to. We decline to do so
8 for the first time here."

9 So after that statement in *Hollingsworth*, is there
10 any law or cases that you can cite to where the federal
11 court has in fact allowed a private party to stand in for
12 the Executive Branch that is still good law?

13 MR. EASTMAN: Well, Your Honor, I think that
14 mischaracterizes what *Hollingsworth* is about. They were
15 specifically seeking to intervene on behalf of the state,
16 not representing their separate, particularized injuries.

17 And --

18 THE COURT: But you continue to say in your
19 briefing that -- or maybe I am mixing it up with your
20 statements in the newspaper, and they are somewhat
21 overlapping, is that if they won't defend it, somebody has
22 to and it should be us.

23 MR. EASTMAN: Well, that's right. But seeking to
24 defend the statute because the party has particularized
25 injury is different than standing in the shoes of the

1 attorney general to defend it. We are not claiming to
2 represent the state. But the county clerk, and I think the
3 *Hollingsworth* case itself at a prior stage when the Imperial
4 County was denied intervention in that case, that was
5 because the county itself and the deputy county clerk didn't
6 have any independent obligation to enforce the law there.

7 "The county clerk," the court said, "may well
8 have, but that was not before us because the
9 county clerk did not seek to intervene."

10 We have a county clerk seeking to intervene.

11 THE COURT: But not in any official capacity you
12 don't.

13 MR. EASTMAN: Well, Your Honor --

14 THE COURT: How do you distinguish *Karcher v. May*
15 on that issue?

16 MR. EASTMAN: Well *Karcher v. May* involved -- I
17 actually think it's much closer to our case and it goes our
18 way. *Karcher v. May* had two legislators who had no
19 authority under the state to intervene other than the state
20 Supreme Court had allowed them to intervene when the
21 attorney general wouldn't defend.

22 The Supreme Court of the United States rejected
23 their continuing intervention after they lost their offices,
24 but it was because they had no longer any particularized
25 injury. They had particularized injury as long as they were

1 in those legislative positions.

2 Here, our county clerk continues to be in that
3 position, and he or she would -- you know, would be bound by
4 a ruling by this court, which the plaintiffs seek to have a
5 statewide injunction issued.

6 THE COURT: Well, "Karcher and Orechio were
7 permitted" -- this is Justice Roberts -- "were
8 permitted to proceed only because they were state
9 officers acting in an official capacity. As soon
10 as they lost that capacity, they lost standing."

11 MR. EASTMAN: Well --

12 THE COURT: So what I know about your clerk is it
13 is an individual in some county in Oregon who works as a
14 clerk. They are not making an appearance in this case. You
15 have avoided any attempt at having a dialogue with this
16 court about protective orders, about declarations under
17 seal.

18 You simply have made this statement: We have
19 somebody who works as a clerk. They have been injured
20 because they may have to, at some point, issue a license in
21 some county to a same-sex couple and they have a religious
22 objection to it. A religious, personal objection. I mean,
23 that was your most current declaration.

24 And by the way, I am not striking the recent
25 declaration that was filed. I know there was a motion to

1 strike. I forget who filed it. But I am going to allow it.
2 I don't think it adds a whole lot other than a little bit
3 more information, which leads me to believe your clerk is a
4 moving target. Every time somebody questions, well, who is
5 this clerk, we get another declaration giving us a little
6 bit more information.

7 But I am not hearing official capacity, any agency
8 relationship. I mean, Roberts goes on and on about agency
9 relationship in *Hollingsworth*. An agency relationship
10 between your clerk and their local government.

11 MR. EASTMAN: Well, wait a minute. The problem we
12 are -- the reason we are being vague, I think, is, I think,
13 well established in *NAACP v. Alabama* and a large number of
14 those cases. There have been a number of cases where -- so
15 I want to unpack this to kind of get the discrete issues.

16 The first is NOM's third-party standing to
17 represent the interests of the clerk or the wedding provider
18 or the voters and then those particular interests.

19 So the reason we are not disclosing who the clerk
20 is is the same reason the doctors in *Griswold/Connecticut*
21 didn't disclose who their confidential married customers
22 were that wanted to seek contraceptive services or that
23 *NAACP v. Alabama* wouldn't disclose their members.

24 There are a whole host of cases from the Supreme
25 Court in that line of cases that specifically say when you

1 have got problems about exposing yourself, the
2 confidentiality that would be lost, the harassment that
3 might follow as a result of that, that's exactly the
4 situation that sets up the opportunity for the third-party
5 standing. So that's why we have done that.

6 Now, the second piece of that, though, is does the
7 clerk, him or herself, have standing. And if the clerk was
8 intervening on the clerk's own behalf, I think there would
9 clearly be standing.

10 And that's the prior round in *Perry* -- in the
11 *Perry* case doesn't address that because a clerk had not
12 moved to intervene in that case. But the language of that
13 that we cite in our brief says that, you know, it may well
14 be different. The clerk may well have standing because the
15 order is going to be applied to that clerk when it finally
16 comes down, when a statewide injunction issues.

17 So as an official of the state who is going to be
18 bound by that injunction, I think -- I think there would
19 clearly be standing.

20 So now the question is can that clerk, by being a
21 member of us with these concerns about harassment, in her
22 private capacity being a member, allow us to raise, on the
23 clerk's behalf, those claims.

24 And I think what we set out in our brief on this,
25 I think, is very important. For example, if a clerk was

1 going to be forced to resign because could not do the job
2 after a decision from here made that job different than what
3 it had been when the clerk had first run for office, that
4 would be a personal harm as a result of the official duties.

5 THE COURT: How would I ever know that? How would
6 I ever know that that's a personal harm? I mean, you
7 haven't even given us, even under seal, the name of the
8 county. I mean, I imagine if we looked at the census data
9 for someplace like Lake County, for example, and that's --
10 not being from Oregon, Lake County is a fairly non-populace
11 county, a large one but not much population -- we may find
12 that in fact there are almost no gay families registered in
13 Lake County, and we might be able to at least use that
14 information to decide, you know, is this a hypothetical
15 harm, it is a real harm, or are Lake County officials
16 willing to make an accommodation for this particular
17 individual.

18 But the way you have formulated it to the court is
19 we have got a phantom back here, take my word for everything
20 that's going to happen to him.

21 MR. EASTMAN: Well, two things. First of all, I
22 think the *Southwest Center* says you have to take the well
23 pleaded facts as true in a motion to intervene.

24 THE COURT: Not conclusory facts, though.

25 MR. EASTMAN: Not conclusory facts, but --

1 THE COURT: That's what I am faced with.

2 MR. EASTMAN: Well --

3 THE COURT: They are beyond inquiry.

4 MR. EASTMAN: Well, let me propose this, then:

5 We could -- we could submit something under seal.

6 We could submit a declaration with the names and the county
7 redacted because I can't exactly identify the county without
8 identifying the county clerk, which, you know, is part of
9 the problem. But I could submit a declaration from the
10 clerk. I'd have to --

11 THE COURT: I'd like a declaration from the county
12 official who is actually authorizing the clerk to intervene
13 in an official capacity.

14 MR. EASTMAN: Well, as we represented in our reply
15 brief, the county clerk is independently elected, which
16 means that there doesn't have to be a specific
17 authorization. There does have to be authorization if they
18 are going to expend county funds. They are not, so -- which
19 is, you know, the other -- the purpose of the third-party
20 intervenor here.

21 THE COURT: Okay. Let me hear from the other
22 parties on -- we have kind of jumped off of my *Hollingsworth*
23 question into the issue of the substantial harm to the
24 clerk.

25 I will hear from the parties on that.

1 Mr. Johnson, do you want to go first?

2 MR. JOHNSON: Yes, Your Honor. What question
3 specifically?

4 THE COURT: Let's talk about the substantial
5 interests of the clerk that's a member of the National
6 Organization for Marriage.

7 MR. JOHNSON: Yes, Your Honor.

8 From a review of their reply brief, NOM's reply
9 brief, it seemed that they had all but conceded that this
10 person was not here in their official capacity.

11 It would have to be the office of the county that
12 was before the court.

13 What NOM is attempting to do here is really borrow
14 two levels of standing. They are attempting to say we are
15 going to stand in the shoes of our member, and then we are
16 going to also, then, adopt their official capacity, the
17 office of that county.

18 And the kind of personal issue or personal
19 interest that they are trying to then assert through that is
20 a -- it's a personal issue. It's really kind of a free
21 exercise issue.

22 And the office of the county, whatever county that
23 is, doesn't have a religion. The office itself is secular.
24 And so they can't represent the county. They can't adopt
25 that office.

1 The -- in terms of the -- if you look at that
2 personal interest, then, which is what you were talking
3 about -- actually, Your Honor, in front of the court in the
4 summary judgment briefing there is exactly the evidence that
5 you are talking about. We submitted, I think it's -- it's
6 in the Misha Isaak declaration, Exhibit 8 or 9, all of
7 the -- all of the -- for the last seven years, six years,
8 all of the domestic partnerships that have been applied for
9 in all of the counties.

10 And there were, by my reading last night, seven or
11 eight counties that have never had a domestic partnership
12 applied for. So it's completely speculative that this
13 person, a county official or not, would ever face this.

14 It's also completely speculative on just the
15 personal issue that this is actually a free exercise issue
16 under the *Smith* case, which is the peyote case, which
17 Ms. Easton spoke about at the last hearing. There, the law
18 is that a generally applicable, religiously neutral law, you
19 can't have a free exercise claim there.

20 And we were looking at the research last night.
21 There are a number of states where gay marriage is now
22 legal, and in none of -- we could not find a single case in
23 any of those states where this free exercise right has been
24 recognized by any court.

25 THE COURT: What do you mean by "free exercise

1 right"? Sorry if I am not --

2 MR. JOHNSON: So in that case, in the *Smith* case,
3 you -- there was -- a person working for the state had a
4 drug test, and they came up positive on peyote. And they
5 said, well, it's my religious right to -- I have to smoke
6 peyote. And the court said, Justice Scalia, and that was
7 what -- remember the feedback at the last hearing,
8 Ms. Easton -- Justice Scalia wrote that opinion, finding
9 that there was no free exercise right here.

10 Here, the generally -- the neutral law would be
11 that anyone who walks in the door of this county has to
12 get -- you know, any two people would have to get married.
13 So it's neutral -- it's a neutral law, no religious specific
14 there.

15 And then there's also a question in terms of the
16 speculative nature of the claim that there's -- we don't
17 have any evidence that -- with this particular county that
18 accommodations could not be made for this clerk. That --
19 that somebody else could do the stapling or the filing of
20 the forms. The *Lee v. State* case is quite clear, Your
21 Honor, that in this state, marriage is really a state
22 function. And what happened in that state -- and we can
23 talk about the *Perry v. Schwarzenegger* case, but we are
24 talking about Oregon law here.

25 What happened in *Lee v. State* was the lawsuit was

1 filed. Then Measure 36 came. And then the Supreme Court
2 said, okay. Well, that's -- Measure 36 is not a violation
3 of the state constitution, the privileges and immunities
4 clause.

5 And Multnomah County said, not so fast. We have
6 issued 3,000 marriages. And so all of those marriages came
7 before Measure 36 came. So they are all valid.

8 And what the Supreme Court of Oregon said was no.
9 That's -- the state is the -- is the arbiter of marriage in
10 Oregon.

11 THE COURT: So why did you file against the
12 Multnomah County equivalent of a -- of a clerk, especially
13 when, in some of the cases I have read, one of the first
14 arguments is why the clerk should be thrown out of the case.
15 I forget which cases those are now, and I am sorry. You
16 might have to remind me. But there are some cases that have
17 been decided on marriage where one of the holdings is that
18 in fact the county clerk has no standing and should not have
19 been named as a party.

20 So why did you do this?

21 MR. JOHNSON: Your Honor, I imagined that you
22 might ask that question.

23 So we filed our lawsuit against the State of
24 Oregon and the office of Multnomah County and the county
25 assessor, the office, the official capacity, in order to

1 have, in an abundance of caution, in light of *Lee v. State*,
2 to have a county, in that office, in front of the court for
3 purposes of the order that we would hope would be issued.

4 But we knew --

5 THE COURT: Well, then why not other counties and
6 other clerks who are going to be subject to the same order?

7 MR. JOHNSON: Exactly. Exactly, Your Honor.

8 And we knew at the time, and I realize that the
9 county is here, but please don't tell them, Your Honor, but
10 we knew that we might be susceptible to a motion to dismiss
11 under *Lee v. State*.

12 But importantly, Randy Waldruff is the person that
13 holds that position who is the county assessor, and we named
14 that office and named him because he holds that office. If
15 it's tomorrow some other person, we would have put their
16 name in the caption and not his name.

17 But we don't care, for purposes of the relief that
18 we are requesting here, what his personal -- it's not
19 germane to any of the issues that we have or the relief that
20 we are requesting in the order what his personal views -- no
21 disrespect to Mr. Waldruff, but we don't care, for purposes
22 of this lawsuit, what his personal views are about same-sex
23 marriage.

24 THE COURT: The argument is that somebody's
25 personal views, when it comes to religion, can be a

1 significant harm, can't it?

2 MR. JOHNSON: It could be, but not in this context
3 Your Honor. *Perry v. Hollingsworth* -- or *Hollingsworth v.*
4 *Perry* is very clear. As you said, the final -- the sentence
5 before the last paragraph said that we have never recognized
6 having a private party come in to intervene to defend the
7 state constitutionality or state statute, and that's what's
8 happening here.

9 So in terms of those personal vows, although they
10 may be very important to someone, they are not -- you can't
11 come in as a -- as -- effectively as the attorney general
12 and defend the constitutionality, and that's what's
13 happening here. And they are just doing it based on those
14 personal views.

15 I want to -- I know you referenced that -- the
16 hyperbole at the outset, and I don't want to dwell on that.
17 And I am completely confident that all of the lawyers in
18 this case are acting in good faith, Your Honor, but I
19 need -- I wanted to address just very quickly the -- in
20 NOM's brief there was reference to "collusion" a number of
21 times.

22 THE COURT: You know, I don't want to discuss
23 that.

24 MR. JOHNSON: Okay.

25 THE COURT: I think it was a poorly -- very

1 poorly -- word choice. It suggests unprofessionalism, and
2 I -- it does make me question about, in terms of
3 discretionary intervention, whether I want to go down a road
4 where people are accusing each other of unprofessional
5 conduct when this court has seen none. So I don't want a
6 conversation on it.

7 MR. JOHNSON: Okay.

8 THE COURT: So I want to hear from Ms. Potter on
9 this issue if she wants to weigh in on the issue of the
10 clerk.

11 MS. POTTER: Thank you, Your Honor. I won't
12 repeat -- I think Mr. Johnson made some good points. I
13 won't repeat those.

14 I think it's important here that the expressed
15 substantial legal interest is not that the clerk would be
16 unable to carry out his or her official duties. It is that
17 if this court were to enter an order, then events might
18 develop such that at some point down the line, the clerk
19 would find himself in a position, or herself, in which he or
20 she -- I am sorry -- in which he or she does not want to
21 carry out part of his or her duties and does not want to
22 delegate any of those duties to someone else.

23 And I don't find any support in any case law for
24 the proposition that just having a personal preference not
25 to want to do part of your job is a substantial legal

1 interest such that it would support an intervention here.

2 I think it also really raises some troubling
3 interests with respect to transparency because if this --
4 this person can only come in as an official of this county,
5 as an elected official of this county, as Mr. Eastman has
6 represented, and is seeking to hide an act that he is
7 attempting to take as an official of this county from the
8 people who will be called upon to vote for him or her in the
9 next election, if there is an official interest of this
10 county official in appearing in this case to argue for his
11 or her interests, it should be done in his or her official
12 capacity and not through a nongovernmental interest group
13 that he or she is a member of just personally.

14 THE COURT: Okay. Mr. Eastman, you have the
15 burden, so I will give you the kind of final reply on these
16 comments.

17 MR. EASTMAN: So I want to give a parallel
18 hypothetical. Suppose we had a public hospital with a nurse
19 who had a strong moral objection to performing abortions and
20 there was a case challenging a state statute dealing with
21 abortion that said they don't have to be performed in the
22 public hospitals, and it was challenging that as a violation
23 of -- unconstitutional.

24 And the relief sought was that every public
25 employee in that hospital would be obligated to perform

1 these abortions. The nurse doesn't want to make an
2 appearance on her own behalf, but she is part of an
3 organization that opposes abortion.

4 The fact that there was a personal interest but
5 that it is affected by her public duties that are going to
6 be directly affected by that litigation I think is
7 sufficient to give her standing and, hence, the third party
8 standing for the organization of which she is a member.

9 And here's what the Oregon Supreme Court said in
10 *Lee*:

11 "The ministerial aspects of issuing marriage
12 licenses in Oregon have, by statute, long been a
13 county function."

14 And then it goes on to list the litany of duties
15 that the county clerk has in the issuance of marriage
16 licenses.

17 The plaintiffs here have sought a statewide
18 injunction through the named state defendants that will
19 reach to every county clerk. So the county clerk, in the
20 performance of those duties, is clearly going to be bound by
21 this injunction if this court grants the relief they have
22 requested. And it will implicate interests of hers or his
23 that are involved because the job that that person took when
24 they ran for that office will now be dramatically different
25 as a result of this court's ruling and the injunction that

1 plaintiffs have sought than it would have been otherwise.

2 The standard for intervention is a very minimal
3 one. That's a protectable interest, and it's a
4 particularized injury. It's not the kind of generalized
5 injury that the Chief Justice Roberts was talking about in
6 *Hollingsworth*.

7 THE COURT: But it's a significant protectable
8 interest relating to the property or the transaction that is
9 the subject of this action.

10 In your hypothetical, the transaction is an
11 abortion and the nurse would be part of that transaction if
12 they were required to participate.

13 Here, the transaction is the conferral of rights
14 of marriage. It's not handing out a certificate in an
15 office. It's the marriage that -- I mean, marriage and
16 going to a clerk's office to get paperwork are two different
17 things. I don't -- I mean, they have to file something, I
18 suppose, but you can file it in any county.

19 MR. EASTMAN: Then the relief that the plaintiffs
20 have sought is not relevant to their case. They have sought
21 an injunction that would require every county clerk to issue
22 those licenses. It's this county clerk that will be
23 obligated to perform that duty in response to such an
24 injunction.

25 THE COURT: Okay. All right. In the -- again, I

1 turn to Roberts in the *Hollingsworth* case where he continues
2 to talk about what I think really is a separation of powers
3 issue, and what you are asking the court to do is say
4 because there are members of your organization that disagree
5 with the Executive Branch's interpretation of the law and
6 failure to defend the law in this case, that a private
7 organization without any agency relationship to the
8 government will stand in.

9 And I mean, it would be me telling Ms. Rosenblum,
10 who is right next to you, Ms. Rosenblum, I am going to
11 replace the Executive Branch with an agency that doesn't
12 answer to you.

13 And what Roberts said is: "Yet petitioners
14 answer to no one; they decide for themselves, with
15 no review, what arguments to make and how to make
16 them. Unlike California's attorney general, they
17 are not elected at regular intervals or elected at
18 all. No provision provides for their removal. As
19 one amicus explains, the proponents apparently
20 have an unelected appointment for an unspecified
21 period of time as defenders of the initiative,
22 however and to whatever extent they choose to
23 defend it."

24 And isn't he really saying that the Judicial
25 Branch should not get involved in who and how the Executive

1 Branch is going to make these decisions?

2 MR. EASTMAN: No. The difference, Your Honor,
3 with all due respect, is Chief Justice Roberts begins that
4 discussion by focusing on the fact that the proponent in
5 that initiative, after the initiative had passed, no longer
6 had any particularized injury.

7 And so all they were doing was objecting in a
8 generalized way to the lack of defense that was being
9 provided by the attorney general.

10 They -- because they had no particularized injury,
11 that whole discussion, I think, doesn't deal with the
12 question where we now have alleged specific, particularized
13 injuries.

14 And Your Honor asked earlier if I had any case
15 where people have been allowed to intervene when the
16 government itself was not adequately or fully defending;
17 nothing since Chief Justice Roberts' opinion because that
18 was relatively recently. But there are a whole slew of
19 cases in the environmental context, for example --

20 THE COURT: That's legislatively created.

21 MR. EASTMAN: Well, it's legislatively created,
22 but --

23 THE COURT: That's where the separation of powers
24 issues come in. There are tons of cases where the
25 legislature says citizen lawsuits, the consumer protection,

1 the environmental law, the law creates citizen lawsuits.

2 But when does the Judicial Branch create them?

3 And I don't -- I mean, the question is I don't know if the
4 Judicial Branch has the authority to create --

5 MR. EASTMAN: Given the duties that the law in
6 Oregon bestows on county clerks, I think the law does create
7 such an interest of particularized injury here.

8 And the statutes could not create standing if it
9 did not meet constitutional grounds. The Supreme Court's
10 been very clear on that.

11 So what the statutes have authorized has to be
12 permitted under the Constitution. What we are saying here
13 is that the particularized injury for the county clerk and
14 for others who have particularized injuries that are going
15 to flow from a change in the law in this state, you know,
16 that that gives them enough standing to be able to intervene
17 to at least be able to raise some objection.

18 And Your Honor, you mentioned earlier on the
19 question of discretion. One of the -- the only issue where
20 there's great discretion is on the timeliness question. But
21 I do think, as part of the discretionary judgment, the fact
22 that the parties are both -- all taking the same side of the
23 case, seeking the same relief, makes this, by definition --
24 and it was not meant as a claim that there's any
25 unprofessional conduct, but by definition, "collusion" is

1 when you take the same side of the case and you are
2 admitting things that --

3 THE COURT: That's not the definition of
4 "collusion." Don't -- let's have honor, Mr. Eastman. You
5 chose "collusion" because it would suggest that the parties
6 have gotten together; not that they just happened to agree
7 on a legal topic. I mean, that's the import of that word.

8 MR. EASTMAN: There's a middle point, Your Honor,
9 on it.

10 THE COURT: You should have chosen a different
11 word.

12 MR. EASTMAN: The middle point --

13 THE COURT: You should have chosen a different
14 word. I don't want to hear about a middle point. It was a
15 bad choice of words. It suggested unprofessionalism.

16 MR. EASTMAN: When somebody makes a concession on
17 factual claims or on legal claims that are not warranted in
18 the law, you have a problem with both parties not being
19 adversarial in the case.

20 THE COURT: Okay.

21 MR. EASTMAN: All right? And --

22 THE COURT: That was the argument that Thomas made
23 in his dissent.

24 MR. EASTMAN: Well, but, again, the issue there
25 was whether they had -- the California Supreme Court had

1 said they have standing because they represent the interests
2 of the state. Right? They did not make the point on
3 whether they had a particularized injury, which is what we
4 are making. The particularized injury line of cases is
5 entirely different on the agency cases.

6 And what Chief Justice Roberts is talking about in
7 *Hollingsworth* is an agency case. They didn't make the --
8 they did make the claim in their brief, but that was not
9 what Chief Justice Roberts was talking about. They claimed
10 that they had a particularized injury that they didn't.
11 Chief Justice Roberts said all you are claiming here is a
12 generalized injury. I think we have got three different
13 reasons why we have particularized injury. The county clerk
14 was one, but I think the others are important as well.

15 THE COURT: How is the voter any different than
16 the backers of the initiative in the *Hollingsworth* case?

17 MR. EASTMAN: They didn't make a vote dilution
18 claim. And I think the argument here is -- again, maybe
19 it's my law professor background, but let me make a
20 hypothetical. Let's suppose in a -- a city in Alabama an
21 African-American majority, temporary majority decides to
22 change their electoral system from an at-wide -- a
23 district-wide -- a citywide to a district election system.

24 The city attorney doesn't like that move. And so
25 somebody sues, alleging that the effort to make that change

1 in the law was designed for the explicit purpose of
2 benefiting a particular race. And the city attorney
3 concedes that point in the answer to the complaint. That
4 then sets up a summary judgment motion that completely
5 negates the effect of that citywide election.

6 That would be a vote negation case, and every
7 African-American who voted in favor of that thing could have
8 a vote dilution claim, even though their interests are
9 generalized to that extent.

10 There's nothing in the Supreme Court's decision in
11 *Hollingsworth* that throws out that entire history of vote
12 dilution cases. But every one of them is, in that sense,
13 generalized. But because of the importance of the right to
14 vote and not have it taken away, either by blocking you on
15 the front end from casting it or negating its effect on the
16 back end by conduct that effectively negates it, that you
17 have those claims.

18 And that's why I think the voters here have a
19 particularized injury as recognized from those cases all the
20 way back to *Reynolds v. Sims* on those vote dilution cases.
21 Every one of those involved a generalized injury, not a
22 particularized one in the way we normally talk about
23 particularized in standing, and yet the Supreme Court has
24 routinely recognized standing in those cases.

25 THE COURT: Okay. Ms. Potter, do you want to

1 respond to that?

2 MS. POTTER: Yes, Your Honor. Thank you.

3 Just on -- in the immediate sense, of course, the
4 votes weren't diluted. People who voted for Measure 36 had
5 their votes counted. Measure 36 became law. It is law.
6 It's being enforced right now today.

7 There's no basis to say that any of their votes
8 were diluted, and the hypothetical is just not comparable to
9 what happened here.

10 The other thing is that the injury that
11 Mr. Eastman is discussing is not the injury that is -- that
12 is relevant to the subject of this lawsuit. What he is
13 articulating is an injury that he believes were done to the
14 voters by the attorney general engaging in an independent
15 analysis of the law and articulating the legal position that
16 she determined was the correct one on the basis of federal
17 and Oregon law.

18 That's not the subject of this lawsuit. The
19 injury appears to be this -- the fact that the plaintiffs
20 and the attorney general reached the same legal conclusion
21 on the legal question that is the subject of this lawsuit.
22 There isn't an injury to the voters on the subject of this
23 lawsuit, which is a question of whether the plaintiffs'
24 civil rights are being violated by Oregon law.

25 THE COURT: Hard one to explain to voters, but all

1 right.

2 Mr. Johnson, any comment on that? You don't need
3 to if you don't have anything to add.

4 MR. JOHNSON: Your Honor, the only other point I
5 would like to make is that in terms of trying to minimize
6 the Supreme Court's holding in *Hollingsworth v. Perry* and
7 say that the court was not considering people in their --
8 the individual views that voters might have or the
9 individual views that a person might have in its holding,
10 the court cited -- you mentioned the *Karcher* case, but the
11 court also, in its reasoning and in its opinion, cited the
12 *Diamond v. Charles* case.

13 And in that case, there was a particular person.
14 There was a criminal statute outlawing abortion that a
15 number of OB/GYN's came to challenge, and the state declined
16 to defend that law. And a conscientious objector to
17 abortion, somebody who had value interests consistent with
18 that statute, similar to the views that people would say,
19 consistent with Measure 36, attempted to intervene. And
20 what the court said was -- and that person also indicated
21 that they had a -- an economic interest consistent with the
22 law because they said, well, I am a pediatrician and if
23 there are fewer abortions, then there will be more patients.
24 So they had both an economic interest that they were putting
25 forth and this kind of value interest.

1 And the court dismissed that and said you can't
2 come in and represent the side of the state when the state
3 chooses not to enforce this law in the way that you would
4 want it enforced.

5 And the court and Justice Roberts in *Hollingsworth*
6 *v. Perry* talked about that case. That case is inherent in
7 the court's ruling.

8 THE COURT: Okay. I'd ask you to respond to this
9 statement:

10 "A prime purpose of justiciability is to
11 ensure vigorous advocacy, yet the court insists
12 upon litigation conducted by state officials whose
13 preference is to lose the case."

14 And granted, that is in Justice Thomas's dissent,
15 but it does certainly reference what the intervenors are
16 claiming, and that is advocacy is something that should
17 be -- that improves the system and improves decision making
18 as opposed to hinders it.

19 What are your thoughts on that?

20 MR. JOHNSON: I think I will answer that -- I am
21 not going to be too roundabout, but I will give a little bit
22 of a history lesson here in terms of this case.

23 So when we came into this case, the *Rummell*
24 plaintiffs, we were a couple months behind the *Geiger*
25 plaintiffs, and we brought our case knowing that -- that

1 there was an answer in the *Geiger* case already, and that
2 answer attached the memo from then Deputy Attorney General
3 Mary Williams to Michael Jordan; not that Michael Jordan.

4 And the -- so we were -- it was clear to us at
5 that point when we came into this lawsuit that this case
6 would be potentially a bit different from other cases where
7 I have been on the other side of the DOJ. And so we knew
8 that. That was obvious. That was in the court record.

9 And we had the hearing for the consolidation here
10 in January. And then after that, we inserted -- the court
11 asked for a scheduling order, and we inserted into that
12 scheduling order for the court's consideration an amicus
13 date because we did the research at that time. We looked at
14 *Hollingsworth v. Perry*. We looked at these issues and said,
15 okay, we are going to have a situation here where the court
16 might be confronted with a situation where the state may not
17 assert certain interests in the way that some people would
18 want those interests to be asserted. So let's propose to
19 the court that there be an amicus date. And that amicus
20 date came and went.

21 But the thought was that yes, Your Honor, that
22 this is, we recognize, a bit of a different experience in
23 terms of the fact that the state is not defending the law in
24 the same way that some organizations out there might want it
25 to be defended, but that doesn't change the law in terms of

1 whether or not they have a right to intervene here.

2 THE COURT: Okay. Ms. Potter, anything on that
3 issue?

4 MS. POTTER: Yes, Your Honor. Not only -- the
5 state has advised if the court wants to hear the -- the
6 state has certainly laid out arguments that have been made
7 in other cases around the country. The court has available
8 all those cases, the briefings by defendants that are
9 defending their state bans vigorously. We have attempted to
10 assist the court in its decision by laying out those
11 arguments and responding to them. So the court has that
12 opportunity.

13 We also, if the court wishes to receive briefing
14 from NOM on the legal questions that are part of this, not
15 as a party but as an amicus, simply to make those arguments
16 with a level of vigor and conviction that the state is not
17 presenting because we analyzed them and determined that
18 those were not a basis to uphold the law, we don't have an
19 objection to the court deciding that it would like to
20 receive a late-filed amicus brief in which NOM can make all
21 of the arguments that it wants the court to consider.

22 And I think it really gets -- this gets to the
23 distinction between advocacy and being an adversary, and NOM
24 has suggested that it wants to play an adversarial role.
25 And the problem is it is not an adversary to the plaintiffs

1 here nor are its members because nothing that this court
2 could order NOM to do would have any effect on the relief
3 that the plaintiffs are actually seeking.

4 So legally NOM isn't an adversary. The parties
5 who are in a position to be ordered to do something and to
6 defend the state law are in the case already. That's the
7 adversarial role. The advocacy can be handled by an amicus
8 brief if the court wants to accept a late-filed brief. We
9 don't have an objection to that.

10 THE COURT: Okay.

11 MR. EASTMAN: Your Honor, can I address that
12 point?

13 THE COURT: Yes. And I think, Mr. Eastman, I am
14 probably -- those are really the heart of my questions. So
15 if you want to make a general statement, if you want to
16 respond and anything else outside of your briefs you want me
17 to consider, now would be the time to convince me.

18 MR. EASTMAN: You know, on this both parties have
19 said repeatedly that the state defendants are enforcing the
20 law, and that, under *Windsor*, was enough to create the
21 necessary adversarialness for jurisdiction according to
22 Justice Kennedy's opinion. But that's not accurate. They
23 are only enforcing half of the law. With respect to at
24 least two of the plaintiffs, those who were married out in
25 Canada and are seeking to have the marriage recognized, the

1 day after the lawsuit was filed, the attorney general said,
2 we are not going to enforce that, and they have actually now
3 adopted regulations in this state not enforcing that part of
4 the law.

5 So at least on that part of it, there is not only
6 not a defense of the law but not an enforcement of the law
7 either. And I do think that creates a real problem for
8 adversarialness, even under Justice Kennedy's *Windsor*
9 opinion.

10 There's an easy way out of that, according to
11 *Wright* [sic] and *Miller*. The easy qualification is that a
12 case where the parties desire the same result may be saved
13 by intervention of a genuine adversary who represents the
14 rights that otherwise might be adversely affected.

15 So if we have rights of a county clerk who are
16 adversely affected or voters on a vote dilution claim or
17 wedding providers who are going to have a different legal
18 regime that they have to operate under as a result of a
19 statewide injunction, if it issues as the plaintiffs have
20 requested, those are rights that might be adversely
21 affected. Any one of them could intervene on their own
22 name. We believe that there's clear authority for us as an
23 organization to intervene on their behalf given the hurdles
24 to them intervening themselves.

25 THE COURT: Okay.

1 Anything else outside your briefs?

2 MR. EASTMAN: No, Your Honor.

3 THE COURT: Anything from the other parties you
4 want me to consider outside your briefing?

5 MR. JOHNSON: Your Honor, could I talk about the
6 timeliness issue for a moment?

7 THE COURT: You can if there's something new. I
8 think I have -- and I have put together a list here in my
9 notes of findings with regard to the timing.

10 MR. JOHNSON: The only thing I wanted to add is
11 that one of the factors in timeliness is, obviously, in the
12 complete discretion of the district court.

13 THE COURT: Yes.

14 MR. JOHNSON: On timeliness, one of the factors
15 for timeliness -- there's three prongs: The stage of the
16 proceedings, the reason for the delay, and the prejudice.

17 On the stage of the proceedings, we made the
18 point, I am not going to make it again, about 38 hours
19 before the motion for summary judgment was heard and all of
20 that. And then the cases on both sides were, frankly, not
21 applicable. You know, it's really the question of the stage
22 of the proceedings in this case.

23 And I am sure that we all -- all the lawyers and
24 Your Honor have been involved in cases that went on for much
25 longer and involved many depositions and that kind of thing.

1 That's not this case.

2 But if the court were to look to see, okay, well,
3 what kinds of cases could I compare this to to determine the
4 stage of the proceedings, we would urge Your Honor to look
5 at all of the cases that have been filed post-*Windsor*. And
6 if you look at those cases, and now I think 13 have been
7 decided, all in the direction that we are seeking here, Your
8 Honor, but if you look at those cases, there are a number of
9 them that have been decided in less time or around the same
10 time as right now here in this case.

11 So in terms of the stage of the proceedings, we
12 believe that they are late; that the *Bostic v. Rainey* case
13 in Virginia was brought in July and decided in February.
14 The *Love* [sic] *v. Beshear* case was brought in July and
15 decided in February. The *Lee v. Orr* case in Illinois was
16 brought in December and decided in February. That's three
17 months. The *De Leon* --

18 THE COURT: Which case was that? I am sorry.

19 MR. JOHNSON: The *Lee v. Orr* case in Illinois was
20 brought in December and decided February, three months. The
21 *De Leon v. Perry* case in Texas was brought in October and
22 decided in February, four months. And just yesterday, the
23 Idaho District Court struck down that state's gay marriage
24 ban. That case was brought in November and decided
25 yesterday. The motion for summary judgment in that case was

1 filed on February 18th, the same day we filed our motion.

2 THE COURT: Okay. Timing, Mr. Eastman, if you
3 want to?

4 MR. EASTMAN: The one thing not in our brief on
5 this point is the statement by the ACLU's executive
6 director, counsel for the plaintiffs here, back on
7 January 25th. "I think it's a little early to characterize
8 the state's defense of Measure 36." This is in one of the
9 exhibits attached to one of the declarations.

10 "I think we will not have a clear picture until
11 the state responds to our own motions for summary judgment."

12 I think that's true.

13 And what happened since then, we learned that what
14 those legal arguments were or, rather, what was being
15 abandoned, we learned that there was not going to be an
16 appeal taken.

17 And quite frankly, NOM did not have standing on
18 its own to intervene until it became clear that it had
19 members who had this *NAACP v. Alabama* hurdle to intervening,
20 themselves. That did not happen overnight, but we were
21 diligent in trying to pull that together.

22 THE COURT: Okay. All right. I am going to take
23 a brief recess, maybe five minutes, and go over my notes. I
24 think I am prepared to issue a ruling on intervention. So I
25 am going to take a -- let's take a five-minute recess.

1 (Recess.)

2 THE COURT: I did want to address a filing, the
3 notice of request for information regarding recusal that was
4 filed by the proposed intervenor.

5 I had a little hard time understanding what was
6 being asked. I think there's a misunderstanding in the
7 notice of both the facts and the law in the case, and I may
8 have contributed some to misunderstanding of the facts back
9 on January 22nd.

10 So I want to clarify that I have never made a
11 finding under Section -- it would be 455(a) for recusal that
12 would warrant a waiver by the parties to the case. A
13 finding hasn't been made.

14 You know, there's quite a -- I don't think there's
15 a legal basis for a nonparty, or maybe even a party, to
16 discovery of a judge on an issue of recusal, but I did open
17 my mouth up on January 22nd, so I don't have any problem
18 explaining some of this to you because it was raised.

19 So let me kind of clarify some of the issues that
20 were raised in the notice. And I want to begin by -- I
21 think I said this on January 22nd. On the issue of gay
22 marriage, I have never attended a rally. I have never made
23 a public statement. I cannot recall having donated money to
24 an advocacy group that supports gay marriage.

25 Despite being gay and involved in the law, the

1 subject of gay marriage has held little legal or personal
2 interest to me. Until I was assigned to this case, I had
3 not read the entirety of the *Windsor* decision. I had read
4 the dissent, and I had read none of the *Hollingsworth*
5 opinion. And I know of no personal or financial benefit I
6 would receive that is dependent on the outcome of this case.

7 What I think I tried to discuss on January 22nd
8 was that I do try my best, in a small community, which is
9 generally Oregon, to avoid political discussions on matters
10 that could come before me. There are times when comments
11 are made, but inadvertent comments of others are not the
12 basis upon which impartiality can reasonably be questioned.

13 So to give examples on an issue of same-sex
14 marriage and where it probably comes up the most where I am
15 subject to comments, it has actually been the times I attend
16 Mass in recent years it has become very common for a priest
17 to read political statements from the bishop or archbishop
18 to the congregation condemning efforts to legalize gay
19 marriage.

20 Another example that I raised at the January 22nd
21 hearing was a CLE I attended at the law school. And I
22 raised it because I believe it's Ms. Middleton was one of
23 the speakers. I didn't know Ms. Middleton. I was just
24 moved to Eugene when my clerks and I attended the CLE. It
25 was approved for credit by the Oregon State Bar. It was

1 sponsored by the Oregon School of Law -- or University of
2 Oregon School of Law, OGALLA, and, I believe, the ACLU.

3 And generally, it was a lecture on the history of
4 *Windsor*, the holding, and the difficulty that practitioners
5 face trying to advise clients.

6 At the very end, and this is where I said what
7 made me nervous is I don't like to be campaigned. And at
8 the very end, somebody from an organization in favor of a
9 ballot initiative redefining marriage spoke, asking people
10 to volunteer to stay and sign up. My clerks and I left
11 because we did not want to become part of a political
12 campaign.

13 And I guess those are the kind of events that I am
14 talking about that if people were aware of and they had
15 questions about I was willing to share them.

16 The other issue that's been addressed both by the
17 notice and repeatedly with the media is the fact that I
18 share characteristics with, I guess, at least the male
19 plaintiffs in this case in that I am gay and raising a
20 child. It's true. I guess we do share characteristics. To
21 anyone under the age of 35, I think they would say that
22 Mr. Eastman and I share more personal characteristics. So,
23 you know, we are white, we are male, we are exactly the same
24 age, I believe, or close to it. I think we are both --
25 well, I am 53. We have worked our whole life in the law.

1 We have both been advocates. We have both -- you know, as a
2 public defender, I know what it's like to sometimes take on
3 issues in an unpopular, sometimes, setting.

4 But the fact that the plaintiffs share
5 characteristics with me, gay men appear in front of me all
6 the time, sometimes with their families, throughout the
7 years on criminal cases, on family law cases, on civil
8 cases. I have sent people with very similar characteristics
9 of me to prison, and I haven't given a thought to the fact
10 that we have common characteristics.

11 So to me, in this case it's irrelevant. Certainly
12 if the posture of the case changed, I would certainly -- I
13 certainly understand my ongoing duty as a judge to be aware
14 of any possible conflict.

15 So I did want to address that because it was
16 raised by notice.

17 With regard to intervention, I am not going to
18 leave you all hanging with a big surprise. I am going to
19 deny intervention, and here is my, just, bench opinion:

20 Federal Rule of Civil Procedure 24 allows the
21 court, in certain circumstances, to permit intervention of a
22 nonparty in ongoing litigation. Intervention can be of
23 right or by permission of the court. The burden is on the
24 proposed intervenor to demonstrate that it meets the
25 requirement under rule.

1 The Ninth Circuit has held that, in determining
2 whether intervention is appropriate, the court should be
3 guided by practical and equitable considerations.

4 The parties seeking intervention by right must
5 make a four-part showing under Rule 24(a). Of the four, I
6 am going to focus on the first two prongs: Whether the
7 application is timely and whether the proposed intervenor
8 has a significant protectable interest relating to the
9 property or the transaction that is the subject of this
10 action.

11 Intervention under Rule 24(b) is discretionary
12 with this court. Nonetheless, to allow for consideration of
13 the court, the proposed intervenor must satisfy a
14 three-prong showing that the motion is timely; that it has
15 an independent grounds for federal jurisdiction; its claim
16 or defense and the main action share a common question of
17 law or fact.

18 So the threshold question is timeliness, and the
19 court makes the following findings:

20 The *Geiger* plaintiffs, *Geiger*, *Nelson*, *Duehmig*,
21 and *Greisar* -- *Greisar*? *Greesar*? *Greisar*?

22 MR. PERRIGUEY: *Greisar*.

23 THE COURT: *Greisar*. Thank you. Sorry.

24 Brought this action on October 15th, 2013,
25 challenging the definition of marriage found in the Oregon

1 Constitution and the Oregon statutes.

2 The *Rummell* plaintiffs, which include Rummell,
3 West, Chickadonz --

4 MR. ISAAK: Chickadonz.

5 MR. JOHNSON: Chickadonz.

6 THE COURT: Chickadonz and Tanner filed their
7 action on December 19th, 2013. Their challenges were
8 identical to the *Geiger* plaintiffs.

9 The court consolidated the cases on January 22nd,
10 2014. At the same time, the parties agreed that this matter
11 would be submitted to the court for dispositive ruling on
12 summary judgment. The dispositive motion hearing was set
13 for April 23rd, 2014.

14 And that was -- and I agree. That was going to
15 be, under this -- the case posture, the dispositive, final
16 hearing on the matter and only hearing on the matter.

17 The plaintiffs filed their motions for summary
18 judgment on February 18th, 2014. That's the *Geiger*
19 plaintiffs. The *Rummell* plaintiffs filed their motions for
20 summary judgment on March 4th, 2014.

21 Prior to this case ever being filed, Attorney
22 General Rosenblum, in an amicus brief to the Ninth Circuit,
23 took a clear position that, quote, The exclusion of same-sex
24 couples from marriage is unconstitutional. This occurred in
25 October of 2013.

1 On February 20th, 2014, having just filed their
2 answer to the *Rummell* complaint, Attorney General Rosenblum
3 announced publicly that the state would not be defending the
4 Oregon marriage laws based on their interpretation of recent
5 appellate decisions.

6 That same day, the proposed intervenor, the
7 National Organization for Marriage, announced that, quote,
8 Attorney General Rosenblum is shamefully abandoning her
9 constitutional duty, closed quote.

10 As early as January 25th, 2014, counsel for
11 proposed intervenor was calling for the Oregon governor and
12 the attorney general to uphold their oath of office and
13 defend the Constitution of Oregon.

14 Defendants Kitzhaber, Rosenblum, and Woodward
15 filed their response to summary judgment motions on
16 March 18th, 2014. In their response, the defendants took
17 the position that plaintiffs' motion for summary judgment
18 should be granted because the defendants believed that
19 Oregon's marriage laws restricting marriage to one man and
20 one woman could no longer pass scrutiny under the federal
21 constitutional analysis put forth in recent appellate
22 decisions.

23 By April 1st, 2014, this court had received amicus
24 briefs from three citizen groups.

25 On April 21st, 2014, so just two days prior to our

1 dispositive motion hearing, counsel for the proposed
2 intervenor conferred with plaintiffs' counsel regarding
3 intervention and delaying the April 23rd summary judgment
4 hearing.

5 At 11:04 p.m. on the evening of April 21st, 2014,
6 a motion to intervene was filed.

7 On April 22nd, 2014, the proposed intervenor filed
8 a motion to delay the April 23rd hearing. That motion was
9 denied as untimely, and argument was set for today to take
10 up the issue of intervention.

11 The proposed intervenor has provided no credible
12 reason for failing to notify the court of its intent to
13 intervene sooner than the 40-hour windrow prior to the
14 dispositive motion hearing.

15 The proposed intervenor had a clear understanding
16 of the attorney general's position two months prior to the
17 April 23rd hearing.

18 The proposed intervenor has submitted no credible
19 reason for failing to determine whether any Oregon member of
20 its organization had significant and protectable interests
21 until, as they stated in their brief, only days ago. By
22 their own admission, their membership is only around 100
23 Oregon members.

24 Proposed intervenor chose not to file an amicus
25 brief raising the issue of intervention or even a simple

1 notice to the court as to their intent.

2 So I am finding the motion to intervene is
3 untimely.

4 With regard to intervention of right, the proposed
5 intervenor has, among its approximately 100 members, an
6 unidentified worker in the wedding industry, an unidentified
7 county clerk, and an unidentified voter that the proposed
8 intervenor submits have significant protectable interests in
9 this case.

10 The court and the existing parties are unable to
11 determine the degree of the members' protectable interest
12 because the proposed intervenor has chosen not to disclose
13 their identities. And I understand there are, I think,
14 genuine issues of concern that the proposed intervenor may
15 have. But rather than hold a dialogue with the court
16 regarding protective orders or requesting to file
17 declarations under seal or in camera discussions, the
18 proposed intervenor has made the members immune from inquiry
19 by the parties and by the court to ascertain standing on
20 anything other than conclusory statements of the proposed
21 intervenor.

22 One of the proposed members is a voter who voted
23 for passage of Measure 36 in 2004. The voters' interest in
24 the outcome of a case is of a general interest and not a
25 significant protectable interest that would allow for

1 intervention.

2 One of proposed members is an individual who works
3 as a clerk in a county in Oregon. The clerk is not
4 appearing in an official capacity as a representative of any
5 particular county or local government.

6 The proposed intervenor has provided little
7 information as to what the clerk's protectable interest is
8 in this litigation other than that he or she may be required
9 to perform a job duty that they might have a moral or
10 religious objection to. Such a generalized hypothetical
11 grievance, no matter how sincere, does not confer standing.
12 It is not at issue in this case.

13 One of the proposed intervenors' members works as
14 a wedding service provider who also has a general moral or
15 religious objection to same-sex marriage. It is unclear
16 what service the member provides.

17 The case here is about marriage. I know,
18 Mr. Eastman, you have tried to clarify this in your brief,
19 but this case is not about who gets to eat cake. I have
20 married many couples over the years in Oregon who fly off to
21 Hawaii; they fly off to their hometown or their parents'
22 town to take their formal vows and vice versa. I mean,
23 there are, I assume, same-sex couples who go to Washington
24 to get married and yet they come here to take their vows and
25 ceremonies here in Oregon.

1 Nothing about a ruling I make is going to change
2 that. Nothing about a ruling I make will change the Oregon
3 laws that forbid businesses from discriminating against
4 consumers based on sexual orientation. The harm, such as it
5 is, already exists.

6 Discretionary intervention.

7 The proposed intervenor seeks discretionary
8 intervention in order to provide the defense to Oregon
9 marriage laws, quote, that the government itself should be
10 raising but is not, closed quote. The argument, at the end
11 of the day, is that the Executive -- if the Executive Branch
12 of government is not willing to defend the law the Executive
13 Branch believes is unconstitutional, then someone has to do
14 it and it should be us.

15 The National Organization for Marriage is a
16 Washington, D.C. based political lobbying organization, and
17 and I am not -- I mean, I am just stating what I -- I think
18 it's fact. I mean, obviously the ACLU is a political
19 lobbying organization as well, but in terms of intervention,
20 I want to focus on that because your membership in Oregon is
21 approximately a 100 members. I am not finding that that is
22 a representative number of Oregonians.

23 More significantly, the Executive Branch is
24 answerable to the electorate of Oregon. Mr. Eastman and the
25 directors of the National Organization for Marriage are not.

1 It would be remarkable, following the
2 *Hollingsworth* opinion, for a court to substitute the
3 Executive Branch of government with a private interest
4 organization simply because the organization disagrees with
5 the legal interpretation of Oregon's elected official.

6 This is an Oregon case that impacts the lives of
7 Oregon citizens. Its timeliness and its posture are not
8 going to be held in abeyance by the intervention of a
9 political lobbying group.

10 I know that many Oregonians are probably
11 disappointed by the lack of adversarial debate in this case,
12 but I am not prepared to substitute the Executive Branch
13 with a third party. And it's, to some degree, phantoms.
14 It's hard for me to really get a clear idea of these harmed
15 members given the posture they have been presented in.

16 So it's an Oregon case. It will remain an Oregon
17 case.

18 The motion to intervene is denied.

19 Mr. Eastman, I do appreciate your arguments. I
20 appreciate your briefing. You are a smart guy, and I -- you
21 know, thank you.

22 All right.

23 MR. EASTMAN: Your Honor, if I may --

24 THE COURT: Yes.

25 MR. EASTMAN: -- because we need to request a

1 stay. This is an immediately appealable order, as you know,
2 and we'd like a stay pending appeal of your order.

3 THE COURT: The stay will be denied.

4 Okay.

5 MR. JOHNSON: Your Honor, may I make one
6 comment --

7 THE COURT: Yes.

8 MR. JOHNSON: -- in terms of your factual
9 findings.

10 I believe that the *Geiger* plaintiffs originally
11 brought their motion for summary judgment in January. They
12 amended their memo on February 18th, and we also filed our
13 motion for summary judgment on February 18th.

14 I think the March 4th date -- March 4th date is
15 the date that the county replied to our summary judgment
16 motion.

17 THE COURT: You are correct. Thank you for
18 correcting that. I was scribbling down a lot of notes
19 quickly. Okay.

20 MR. PERRIGUEY: Your Honor, there was one other
21 factual issue.

22 THE COURT: Yes.

23 MR. PERRIGUEY: The state actually issued the
24 order from Michael Jordan the day after the *Geiger*
25 plaintiffs. You mentioned the *Rummell* plaintiffs in your --

1 THE COURT: Aah. Okay.

2 MR. PERRIGUEY: So that's just a slight
3 modification.

4 THE COURT: All right. Thank you. I will allow
5 that correction.

6 Anything else that I have mistaken on my dates?

7 All right. Thank you very much.

8 THE CLERK: Court is in recess.

9 *(The proceedings were concluded this*
10 *14th day of May, 2014.)*

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1 I hereby certify that the foregoing is a true and
2 correct transcript of the oral proceedings had in the
3 above-entitled matter, to the best of my skill and ability,
4 dated this 15th day of May, 2014.

5

6 /s/Kristi L. Anderson

7

Kristi L. Anderson, Certified Realtime Reporter

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